Supreme Court, U.S
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No. _____

# In the Supreme Court of the United States

HOWARD A. WINTERS,
Petitioner,

v.

STATE OF OREGON, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

As a matter of law, is there a "taking" under the Fifth and Fourteenth Amendments to the Constitution of the United States when the Government, over the objection of the owner, repeatedly physically invades and uses private property to construct a public project on adjacent land, the physical invasion is temporary, and the physical invasion causes no physical damage to that property?

## LIST OF PARTIES

Petitioner Howard A. Winters and Respondent State of Oregon by and through its Department of Transportation were parties in the Court of Appeals of Oregon and the Supreme Court of Oregon and are both interested parties in this matter.

## LIST PURSUANT TO RULE 29.6

Petitioner is an individual and not a corporation and therefore, Rule 29.6 is inapplicable.

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No. _____

HOWARD A. WINTERS,

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v.

STATE OF OREGON, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,

**Respondent.**

**On Petition for a Writ of Certiorari to the Court of Appeals of Oregon**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon entered in this case on September 27, 2000.

## OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 170 Or. App. 118 and 10 P.3d 961 and is reproduced in the Appendix at B. 2a. The Order of the Supreme Court of Oregon denying review is unreported and is reproduced in the Appendix at A. 1a.

## JURISDICTION

The judgment of the Court of Appeals of Oregon was entered on September 27, 2000. A timely petition for review was denied by the Supreme Court of Oregon on May 29, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 18 of the Constitution of the State of Oregon are reproduced in the appendix at E. 26a.

## STATEMENT

This is a condemnation action brought by Respondent the State of Oregon, by and through its Department of Transportation, against Petitioner Howard A. Winters, the appellant at the Court of Appeals. The State condemned a portion of Petitioner's property for construction of a public highway improvement project. During the construction of that public project, the State repeatedly, and over Petitioner's objections, physically invaded and used additional portions of Petitioner's property beyond the portion condemned without payment of just compensation for such additional use.

In essence, the State took a temporary work easement in order to complete a public project, but refused to compensate Petitioner for that taking. Accordingly, Petitioner filed a counterclaim against the State alleging that the appropriation of this temporary work easement constituted a taking by inverse condemnation. The undisputed evidence at trial established that the State

physically invaded Petitioner's private property outside of the portion of the property condemned on numerous occasions, over Petitioner's objections, all to facilitate construction of a public project. Accordingly, at the close of the evidence, Petitioner moved for a directed verdict on his first counterclaim for inverse condemnation. The trial court denied the motion and the court of appeals upheld that ruling.

Petitioner's property comprises 163 acres of farmland and is located on the north side of Crown Point Highway in Multnomah County, Oregon. In 1991, the State took a permanent slope easement and an access easement to do repairs of rockslides on the side of the highway. The stated purpose of the proposed acquisition was to mitigate further a rockslide and to relocate, construct, improve and maintain the highway. Defendant received $7,000.00 for these two easements. In 1996, the State of Oregon proposed to take a strip of land totaling 2.69 acres from petitioner Winters, adjacent to the Crown Point Highway to mitigate rockslides above the highway. Defendant contested the taking on the basis that the repair project being considered could not actually be done and that the State had not taken sufficient access space to do the project safely.

Petitioner is 87 years old and has owned the property since the 1950s. His property is used primarily as farmland to grow fruits and vegetables. After the aforementioned project started both petitioner and his son observed various State employees and their vehicles outside of the designated access area. No one gave the State employees permission to go outside the property or access areas previously condemned on petitioner's farm and petitioner repeatedly told the State employees to stay off his private property unless arrangements were made to pay him just compensation for the use of that property.

The case was bifurcated for trial. The first portion of the trial involved the lawfulness of the taking, which Petitioner contested. The trial court found the taking lawful. The case then proceeded to trial by jury on the issues of just compensation and Petitioner's counterclaims for inverse condemnation for the taking and use of additional property, as well as an alternative trespass claim. Petitioner moved for directed verdict on his counter-claim for inverse condemnation, which the trial court denied. The jury found a trespass and awarded $2,000 on that claim, but not inverse condemnation. Petitioner sought relief from the Oregon Court of Appeals asking for reversal of the judgment and a new trial.

The court of appeals concluded that, under *Hawkins v. City of LaGrande*, 315 Or. 57, 68, 843 P.2d 755 (1992) (a case not cited or relied upon by the State in the Court of Appeals), the jury was entitled to find that the interference with Petitioner's property was insubstantial, and therefore no taking occurred. The court justified this conclusion on the grounds that "[t]here was no evidence that the surveyors used any particular portion of the property for any extended period of time or caused any physical damage." *State v. Winters*, 170 Or. App. 118, 121, 10 P.3d 961 (2000). In reaching this conclusion, the court disregarded controlling decisions by this Court dictating a contrary result.

While the court of appeals cited *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982), for the limited purpose of pointing out that it formed the basis for Petitioner's argument, the court of appeals otherwise ignored the analysis of this Court. In choosing not to follow this Court, the court of appeals essentially created an additional element to federal takings law: that a property owner must demonstrate not only physical invasion and evidence of the actual use, but also that the invasion and use were a "substantial interference" so defined as to require

a showing of physical damage or that the invasion lasted for some undisclosed "extended period of time." *Winters*, 170 Or. App. at 121.

## REASONS FOR GRANTING THE PETITION

The Oregon Court of Appeals, through its decision in this case, has created a rule of law governing "takings" analysis which ignores and contradicts federal constitutional law. The court of appeals concluded that because there was no evidence that the State caused physical damage or remained on the property for an extended period of time, the jury was entitled to find that the interference with Petitioner's property was insubstantial, and therefore no taking occurred.[1] *Winters*, 170 Or. App. at 121. This conclusion ignores the well-established rights of property owners and can not be reconciled with the decisions of this Court and several other federal courts. In addition to the conflict of law created by the court of appeals, the decision in this case is fundamentally at odds with the well-settled truth that the Fifth Amendment does not protect property *per se*, but the rights of the property owner. Because this case presents an issue of substantive importance to the interpretation of the Fifth Amendment's taking clause, it calls for review by this Court.

### I. THE OREGON COURT OF APPEALS CREATED A LEGAL RULE WHICH CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE TAKINGS CLAUSE IN THE FIFTH AMENDMENT

The court of appeals, in this case, generally misunderstood the fundamental rights attached to property

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[1] Curiously, the court of appeals completely ignored the apparent logical inconsistency in the jury awarding $2,000 for damages resulting from trespass, but finding no "substantial interference" with Petitioner's property rights.

ownership that this Court has recognized as protected by the Fifth Amendment. The primary mistake of the court of appeals was to focus on the land or property itself rather than on the State's action and the rights of the property owner. This Court has made clear that the Fifth Amendment primarily protects the *rights* of property owners. *See, United States v. General Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357 (1945) (The word "property" in the Fifth Amendment is not "used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law", but to "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.")

There are two distinct classes of takings – "regulatory taking" and "physical invasion" taking. *Yee v. Escondido*, 503 U.S. 519, 522, 112 S. Ct. 1522 (1992). In *Yee*, this Court explained:

> Most of our cases interpreting the Takings Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation [citing *Loretto, supra*]. But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The first category of cases requires the courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

*Yee*, 503 U.S. at 522.

The U.S. Supreme Court has "long considered a physical intrusion by government to be a property restriction of unusually serious character for purposes of the Taking Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 316 (1982). For that reason, "[a] 'taking' may more readily be found when the interference with the property can be characterized as a physical invasion by government." *Id.* Physical invasion by the government is deemed to be of such serious character because it necessarily deprives property owners of one of their most essential rights: the right to exclude others.

As this Court has explained in another case from Oregon, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383 (1979).

The legal rule that the Oregon Court of Appeals created in this case, focusing on the duration of the physical invasion and the absence of damage to the physical property, conflicts with long-standing takings doctrine as set forth by this Court. This Court has long observed that a physical invasion, no matter how minute and no matter how weighty its public purpose, requires compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886 (1992). *See also Loretto*, 458 U.S. 419 (even a *de minimis* physical invasion for a public purpose constitutes a compensable taking).

This Court has likewise observed that the duration of the physical invasion does not render compensation for the time of that invasion any less obligatory. *First English Evangelical Lutheran Church*, 482 U.S. 304, 318-19, 107 S.

Ct. 2378 (1987). In *First English*, this Court discussed the fact that the relevance, if any, of the duration of a physical invasion is in determining what is just compensation, not in determining whether there was a taking. *Id.* In that case, this Court concluded that a temporary taking entitled the landowner to payment of just compensation for the value of the use of the land during the period of the taking. *Id.*

The degree and duration of a taking by physical Invasion are not relevant to a determination of whether a taking has occurred. Because physical invasion by the government for a public purpose deprives property owners of the essential right to exclude others, it constitutes a "substantial interference with property rights" during the period of the invasion. As this Court concluded in *Loretto,* even a *de minimis* physical invasion for a public purpose constitutes a compensable taking. *Loretto*, 458 U.S. at 421. Similarly, in *GTE Northwest Inc. v. Public Utility Commission of Oregon*, 321 Or. 458, 473, 900 P.2d 495 (1995), the Oregon Supreme Court, applying *Loretto*, concluded that in physical invasion cases, the duration of the taking is not relevant to the determination of whether a taking has occurred.[2]

Where, as here, the government physically invades the owner's property and uses it for construction of a public project on land adjacent to it, thus depriving the owner of the right to exclude others from his property, the physical invasion constitutes a compensable taking. *Loretto, supra*, 458 U.S. at 426. *Loretto* makes clear that the degree of the physical invasion is not determinative. *Id.* at 421. The temporary quality of the physical invasion likewise does not render compensation for the time of the invasion any less obligatory. *San Diego Gas & Electric Co. v. San Diego*,

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[2] It is noteworthy that the Oregon Court of Appeals in this case completely ignored the *GTE* case cited *supra* and the analysis from *Loretto* upon which the court in *GTE* relied. Both *GTE* and *Loretto* were cited and briefed by petitioner, but entirely ignored by the court of appeals.

450 U.S. 621, 657, 101 S. Ct. 1287 (1981) (Brennan, J., dissenting); *First English Evangelical Lutheran Church*, 482 U.S. at 318-19.

The Court of Appeals also ignored or misapplied this Court's rulings in considering the absence of evidence of physical damage to Petitioner's property in determining that Petitioner failed to establish his claim for inverse condemnation as a matter of law. Physical damage resulting from the government's physical invasion of private property is not relevant to the determination of whether a taking has occurred. The proper focus of inquiry in the taking analysis must be whether the government's conduct interferes with the rights or interests of the property owner in the property, not whether the physical property itself has been impaired. *General Motors*, 323 U.S. at 377-78. The government's physical intrusion upon Petitioner's property necessarily interfered with his essential right to exclude others. The Fifth Amendment speaks in terms of a "taking" of property not "damage" to property, and is violated anytime the government "takes" private property for public use without just compensation whether it has been damaged or not. The property owner need only establish that the property has been taken for a public purpose without just compensation. Actual use of the property to construct a public improvement is a taking as a matter of law.

The legal rule created by the court of appeals is fundamentally inconsistent with the protection afforded property rights by this Court and by the Fifth Amendment. The right to exclude others is violated when the government invades private property, so duration and property damage can not be determinative factors to whether a taking has occurred.

## II. THE DECISION OF THE OREGON COURT OF APPEALS HIGHLIGHTS AND CONTRIBUTES TO A LACK OF CONSISTENCY IN THE APPROACHES OF THE LOWER COURTS IN APPLYING TAKINGS LAW

The decision of the court of appeals conflicts with federal precedent as discussed above, and highlights a lack of uniformity among lower courts at the state and federal level in applying takings law to "temporary" physical invasion cases.

There is support for the position taken by Petitioner in this case in other jurisdictions, but there is also conflict which necessitates this Court clarify the scope of protection offered by the Fifth Amendment. In light of this Court's recent rulings in this area, a variety of lower courts correctly focus on protecting fundamental property rights as opposed to the property itself and make the violation of those rights the determinative factor as to whether a taking has occurred.

Lower courts have recognized that the duration of the physical invasion is not a relevant factor to the determination of whether there has been a taking. *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 692 (Fed. Cl. 2001), *citing GTE Northwest*, 321 Or. 458, 504, 900 P.2d 495 (1995) ("the duration of the taking by physical invasion is not relevant to the determination of whether a taking has occurred.").

Similarly, in *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991), the court focused on the rights of a property owner. The facts in *Hendler* are nearly identical to Petitioner's case. In *Hendler*, government vehicles and equipment had entered on plaintiffs' land repeatedly, without permission, for the purpose of constructing a public

improvement project. In this context, the Court of Appeals for the Federal Circuit observed that a taking can be for a limited term....a term of finite duration." *Id.* at 1376. Likewise, the concept of a physical taking does not require that in every instance the occupation be "exclusive, or continuous and uninterrupted." *Id.* at 1377.

However, while lower federal courts regularly focus on the property *rights* in takings cases, recognizing that the duration of the physical invasion is of little consequence in light of the invasion itself, other courts have taken an approach more like the one taken by the Oregon Court of Appeals in this case. The confusion among the lower courts focuses on the extent to which factors like the duration of a temporary taking weigh in the determination of whether a taking has occurred given the lack of definitions for terms such as "temporary" and "permanent" which often accompany the tests in takings law. Some courts have found that the duration of the government's physical invasion on private property is a determinative factor for whether a taking occurred under the Fifth Amendment. *Juliano v. Montgomery-Ostego-Schoharie Solid Waste Management Authority*, 983 F. Supp. 319, 328 (ND N.Y. 1997). This lack of uniformity in approach signals a growing need for this Court to clarify the law.

In addressing whether a temporary physical taking qualified for Fifth Amendment compensation, a district court in New York found that the duration of an invasion is a key factor to whether a physical taking has occurred. *Id.* The court noted that the facts in *Hendler* were "strikingly similar" to those presented in the *Juliano* case and pointed out the current confusion regarding the definition of the word "permanent." *Id.* at 326.

The court noted that this Court did not provide a definition of "permanent" in *Loretto* and the lower courts

have disagreed concerning how to address circumstances like the one in this case where there is an undisputed physical invasion of a finite period of time. The court in *Hendler*, as discussed above, focused on the rights involved and said that the invasion does not need to last forever. *Hendler*, 952 F.2d at 1376-77. There the court indicated that the length of time was unimportant given the rights "taken" by the physical invasion. *Id.*

In *Juliano*, however, that court said, ". . . this Court rejects *Hendler's* contorted definition of the term "permanent." *Juliano*, 983 F. Supp. at 328. The court then declined to define the term itself and chose to use a common usage definition which virtually excludes the possibility that there could be a taking via a temporary physical invasion.[3] *Juliano* and *Hendler* point out the confusion in this area of law and the Oregon Court of Appeals has basically ignored the entire analysis suggested by this Court and others, and simply noted that the duration of the physical invasion was determinative.

The conflict between the lower courts' interpretations of physical invasion takings law is patent. Some lower courts focus on the fundamental property rights, while other courts, like the Oregon Court of Appeals in this case, incorrectly focus on the duration of a physical invasion on private property and physical damage in determining whether government conduct constitutes a taking.

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[3] In *Juliano* the court said, "This Court will not give the word 'permanent' any special meaning, but instead adopts a common definition of permanent, such as the following: 'intended to exist or function for a long, indefinite period without regard to unforeseeable conditions.'" *Juliano*, 983 F. Supp. at 328.

## III. THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY THE LAW IN A SETTING THAT WILL FREQUENTLY REOCCUR ALL OVER THE UNITED STATES

This issue will arise each time a government entity anywhere fails to condemn sufficient work area to facilitate construction of a public project and then requires the use of adjacent private property to complete the project. Guidance is required from this Court to further clarify the scope of Fifth Amendment protection for property owners. In *Yee*, this Court itself noted that a physical invasion takings case "requires the courts to apply a clear rule." *Yee*, 503 U.S. at 522. To permit the court of appeal's decision in this case to stand would effectively allow condemning authorities to take and use all forms and types of temporary work and access areas for public projects without first formally acquiring the right to do so.

The analysis employed by the Oregon Court of Appeals and the court in the *Juliano* case essentially removes one of the most important rights inherent in property ownership: the right to exclude others. The mere fact that tort remedies may exist for the government's actions in cases like this does not change the fact that property has been taken and compensation is due under the Fifth Amendment.

This case presents significant issues of federal constitutional law. Without the intervention of this Court, lower courts will continue to misinterpret federal takings doctrine, which protects the rights of private property owners under the Fifth Amendment. For this reason, this Court should intervene and reiterate and clarify the law in this important area.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2001

# APPENDIX

**APPENDIX A**

SUPREME COURT OF OREGON

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SC S48236
CA A100371

STATE OF OREGON, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
*Plaintiff-Respondent*
*Respondent on Review*

v.

HOWARD A. WINTERS,
*Defendant-Appellant*
*Petitioner on Review*

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Multnomah County Circuit Court No. 9604-03061

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PETITION FOR REVIEW DENIED

DECISION WITHOUT PUBLISHED OPINION

**APPENDIX B**

FILED: February 25, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

STATE OF OREGON, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION,
*Respondent,*

v.

HOWARD A. WINTERS,
*Appellant.*

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(9604-03061; CA A100371)

Appeal from Circuit Court, Multnomah County.

Roosevelt Robinson, Judge.

Donald Joe Willis argued the cause for appellant. With him on the briefs were Karen O'Kasey and Michael A. Cohen.

Jas. Jeffrey Adams, Assistant Attorney General, argued the cause for respondent. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Before Deits, Chief Judge,* and Wollheim and Brewer, Judges.

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* Deits, C. J., *vice* Landau, P. J.

BREWER, J.

Judgment dismissing fourth counterclaim with prejudice reversed and remanded for entry of judgment of dismissal without prejudice; otherwise affirmed.

**BREWER, J.**

Defendant owned property adjacent to State Highway 125 in Multnomah County. In 1996, plaintiff, the State of Oregon, through the Department of Transportation, proposed to acquire a strip of property from defendant along the highway for the purpose of mitigating rock slides. Defendant opposed the acquisition, and plaintiff commenced this action for condemnation. In his answer, defendant asserted three counterclaims for inverse condemnation and one counterclaim for trespass. Defendant appeals from an adverse judgment, assigning error to the trial court's rulings on his inverse condemnation counterclaims. He also assigns error to the trial court's failure to admit evidence that he asserts was relevant for the purpose of determining just compensation for the condemned property and to the court's refusal to permit discovery that defendant asserts was necessary to determine whether he was entitled to attorney fees.

The relevant facts are not disputed. Defendant's total property consists of 163 acres of farmland adjacent to State Highway 125 near Dabney State Park. A county road also ends at a marker located on defendant's property. Defendant has owned the property since the 1950s, and he has used it for agricultural purposes and timber production. The highway lies between the Sandy River and defendant's property. The highway is near river level, and defendant's property slopes steeply upward on the other side of it. The highway adjacent to defendant's property has a history of rock fall. In 1990, a bluff on defendant's property overhanging the highway collapsed, sending 30,000 cubic yards of rock onto the highway. In 1991, defendant conveyed to plaintiff a permanent slope easement and an access easement running from the end of the county road to the slide area. The easements were granted to facilitate the repair of rock slides on the north side of the highway and to prevent rock from sloughing off onto the highway. The state paid defendant $7,000 for the slope and access easements.

In 1996, plaintiff proposed to acquire a narrow strip of defendant's property consisting of approximately 2.7 acres directly above and along the highway. The purpose of the proposed acquisition was to mitigate further a rockslide to the west of the Stark Street Bridge and to "relocate, construct, improve and maintain" the highway. The plan called for use of the 1991 access easement to facilitate construction of a gradual slope up the face of the cliff above the highway, including a "sliver cut" off the side of the slope that would allow rock to fall into a safe area. The state intended to use the excavated rock for construction on Interstate Highway 84. Defendant contested the lawfulness of the taking and the scope of the project and also asserted that it would damage scenic and historic features in the area.

In April 1996, plaintiff filed a complaint to condemn the parcel and also sought the right to enter and use defendant's remaining property to facilitate the project work. Plaintiff alleged that just compensation for the property was $20,500. A lengthy phase of negotiations ensued between the parties concerning the necessity, scope, and safety of the project. By February 1997, plaintiff had determined that the project as originally proposed was not feasible because the condemned area was not large enough. Plaintiff reduced the scope of the project on the recommendation of the general contractor. As revised, the project eliminated the cut in the cliff and the removal of rock. Instead, plaintiff proposed to cut trees along the top edge of the cliff, anchor large rock blocks to the cliff, install a wire mesh over the slope, and cover the base of the cliff with concrete.

The case was bifurcated for trial. In the first phase of trial, which was held in February 1997, the court determined that the taking was lawful. The second portion of the case involved the question of just compensation for the condemned property and the disposition of defendant's counterclaims. After the court determined that plaintiff was entitled to take the property, plaintiff filed an amended complaint alleging that its true value was $8,050. In his supplemental answer, defendant objected to plaintiff's

reduced estimate of just compensation. Defendant also asserted four counterclaims.

The first counterclaim, for inverse condemnation, alleged that plaintiff's surveyors entered defendant's property without permission after the commencement of the condemnation proceeding and "appropriat[ed] the same for a public purpose in the nature of a temporary work easement." Defendant sought compensation in the sum of $2,000 for the alleged taking. Alternatively, in his second counterclaim, defendant alleged that the surveyors' use of the property constituted a trespass.[4] Defendant's third counterclaim alleged inverse condemnation for over-use of the 1991 easement during the course of the project and sought compensation for that additional burden in the amount of $5,000. In his fourth counterclaim, also for inverse condemnation, defendant alleged that plaintiff's use of the condemned property as originally planned would cause a loss of lateral support and erosion to defendant's adjacent property and that just compensation for the taking of those rights is $150,000.

At trial, defendant moved for a directed verdict on his first counterclaim for inverse condemnation. The trial court denied the motion. The court granted plaintiff's motion for a directed verdict on defendant's fourth counterclaim. The parties' remaining claims were tried to a jury. The jury returned a verdict for plaintiff on defendant's first and third counterclaims for inverse condemnation but found for defendant on the trespass counterclaim and awarded him damages of $2,000. The jury also awarded defendant just compensation of $28,888 for the taking of the 2.7 acre parcel.

In his first assignment of error, defendant contends that the trial court erred in denying his motion for a directed verdict on his first counterclaim. In reviewing the trial court's ruling, we consider the evidence in the light most favorable to plaintiff, the nonmoving

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[4] Plaintiff moved to dismiss the trespass claim, asserting that defendant had failed to comply with the notice requirements of the Oregon Tort Claims Act. The trial court rejected that contention and plaintiff does not renew it on appeal.

party. Brown v. J.C. Penney Co., 297 Or. 695, 705, 688 P.2d 811 (1984). The verdict will not be set aside "unless we can affirmatively say that there is no evidence from which the jury could have found
the facts necessary" to support the verdict. *Id.*

In his first counterclaim, defendant alleged that the surveyors' presence on his property during the project amounted to the taking of a temporary work easement and, therefore, resulted in inverse condemnation. Inverse condemnation arises from government action that has the effect of taking property without the formal exercise of the power of eminent domain. *Dept. of Transportation v. Hewett Professional Group*, 321 Or. 118, 130-31, 895 P.2d 755 (1995). A "taking" generally is defined as any "substantial" interference with private property rights. *Hawkins v. City of La Grande*, 315 Or. 57, 68, 843 P.2d 400 (1992); *Vokoun v. City of Lake Oswego*, 169 Or. App. 31, 39, 7 P.3d 608 (2000). "Whether an interference with property rights is 'substantial' is a jury question." *Id.; Hawkins*, 315 Or. at 72.

Defendant asserts that the surveyors' activities amounted to a taking as a matter of law because their presence deprived him the right to exclude others from his property. *See Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (right to exclude others is one of the most fundamental property rights); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). However, the evidence showed only that plaintiff's personnel walked and parked vehicles on some portion of defendant's property on a few occasions during the course of the project. There was no evidence that the surveyors used any particular portion of the property for any extended period of time or caused any physical damage. The jury was entitled to find that any interference was insubstantial. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on his first counterclaim.

In his second assignment of error, defendant contends that the trial court erred in failing to give his requested jury instructions with respect to the first counterclaim. Defendant offered two detailed instructions. The first stated that "[i]nverse condemnation pertains to property rights not specifically sought by the condemning authority, which in this case is the State, but [are] nevertheless taken for a public purpose as a result of the government's conduct." The second instruction purported to explain the claim of inverse condemnation in the context of temporary takings, listing its elements:

> "(1) the property must be taken from a private party; (2) taken by the government, (3) taken for a public purpose, (4) the government must not have paid just compensation for the taking, and (5) the taking is not permanent but of temporary duration. It is not necessary for the landowner to be denied all use of his property or that a landowner be denied economical use of his property."

The court gave a different instruction that essentially covered the elements of a claim for inverse condemnation in the context of a temporary taking. *See Thornburg v. City of Portland*, 233 Ore. 178, 184-85, 376 P.2d 100 (1962) (claimant is required to establish that private property was taken for a public purpose, that the government failed to pay just compensation, and that the taking was temporary in duration). The court instructed, in part, that:

> "With respect to defendant, it's his first counterclaim for inverse condemnation, [defendant] has alleged the State, through its employees and agents, appropriated defendant's property for a public purpose in the nature of a temporary work easement. *This would constitute a temporary taking.*
>
> "In a temporary taking, the fair cash market value is determined by the period that the restriction was in effect and can be characterized as giving the State a lease on the property.

"* * * * *

"You may use either of these two methods ['before and after' method or 'fair cash value method'] in your determination of just compensation for property rights which you find to have been taken by inverse condemnation.

"* * * * *

"Easement is a property right. An easement is a property right. An easement is a non-possessory interest in the land of another which entitles the owner of the easement interest to use the easement for a particular purpose." (Emphasis added.)

The court also instructed the jury at length concerning a property owner's entitlement to just compensation for inverse condemnation and how that compensation is to be determined.

At trial, the court invited the parties to raise on the record any objections to the instructions given. In response, defendant's counsel stated:

"I do want to preserve my record to have objections and exceptions to any instruction that was submitted that was not given. I cannot recall any, though, that--I'm not surprised by what I heard, based on what you said in chambers, but I do want to preserve the record."

Defendant contends that the instructions given did not adequately explain the elements of the claim of inverse condemnation, or what evidence is necessary to establish the claim. He notes that the jury sent three questions to the court about the inverse condemnation claims, suggesting that the court's instructions were inadequate.

The short answer to defendant's argument is that, apart from his general objection, defendant failed to point out to the trial court any specific error in the instructions given. ORCP 59 H requires that "[a]ny point of exception shall be particularly stated * * *." In order to preserve an error in a jury instruction, a party must specifically except to the instruction. *Mark v. Hutchinson*, 132 Or. App. 613, 619, 889 P.2d 361, *rev den* 321 Or. 94, (1995). The purpose of requiring a specific exception is to inform the court that the instruction may be erroneous and to give the court an opportunity to correct it. *Delaney v. Taco Time Int'l*, 297 Or. 10, 18, 681 P.2d 114 (1984); *Ball v. Jorgenson*, 147 Or. App. 55, 934 P.2d 634 (1997).

It is true that ORCP 59 H provides that the failure to give a requested instruction "imports an exception in favor of the party against whom the ruling was made." However, that portion of the rule only applies if *no* instruction at all is given on the subject of the requested instruction. *Thompson v. Inskeep*, 95 Or. App. 688, 690, 770 P.2d 953 (1989). When another instruction on the subject is given, an express objection is required to preserve error, unless the proposed instruction is "clearly and directly" contrary to the given instruction, thereby calling attention to the alleged error. *Id.* at 692.

Defendant's proposed instructions were not so clearly and directly contrary to the instructions given by the court that they called attention to the error claimed on appeal. The trial court's instructions described the elements of inverse condemnation in the context of a temporary taking, although not in the same detail and format as defendant's proposed instructions. In addition, defendant's general objection simply was not sufficient to explain why the court's instructions were wrong. Accordingly, we conclude that defendant has failed to preserve his argument concerning the court's failure to give his proposed instructions.

Defendant further assigns error to the trial court's giving of an instruction in connection with his first counterclaim based on ORS 366.365, which provides:

> "The Department of Transportation may go upon private property for the purpose of examination, inspection or survey to determine the advisability or practicability of locating and constructing a highway thereover, or the source, suitability or availability of roadbuilding materials thereon. The department may exercise this authority prior to the filing or commencement of condemnation proceedings, but in the exercise of such authority no damage shall be done the property nor shall the owner be unnecessarily inconvenienced or disturbed in the use and enjoyment of the property of the owner."

Defendant contends that the court's instruction was erroneous, because the statute authorizes entry onto private property only *before* the filing of a condemnation proceeding; it does not authorize entry onto private property *after* the commencement of a condemnation proceeding, as was the case here. Defendant also argues that the instruction was not appropriate in any event, because the activities permitted by the statute must relate to highway construction and, here, the surveyors' activities were related to a construction project on defendant's land.

Defendant did not except to the jury instruction about which he now complains. In fact, defendant did not object when the court later provided a copy of the statute to the jury, in response to its request for further instructions in connection with defendant's trespass counterclaim. In response to the court's query whether defendant had exceptions to the reinstruction of the jury, defendant's counsel stated that he reserved "whatever prior objections" he had made to the instructions that were previously given but otherwise had no exceptions.

Defendant urges that his failure to except to the court's instruction is of no consequence, because he made his objection to the relevance of ORS 366.365 clear before the jury was instructed. *See Rogers v. Hill*, 281 Or. 491, 496 n 4a, 576 P.2d 328 (1978) (when a party makes a clear objection to a proposed instruction in a colloquy with the court before the jury is instructed, failure to renew the objection after the instruction is given does not render the claimed error unpreserved). It is true that, in support of his motion for a directed verdict on his first counterclaim, defendant argued that ORS 366.365 does not authorize entry onto private property after the commencement of condemnation proceedings. However, unlike the circumstances in *Rogers*, that argument was not made in connection with a discussion of the proposed jury instructions but occurred in an unrelated context. Any claimed error in the court's instruction is therefore unpreserved. *See Lutz v. State of Oregon*, 130 Or. App. 278, 282-83, 881 P.2d 171 (1994) (objection to earlier evidentiary ruling did not suffice as an exception to court's subsequent limiting jury instruction dealing with the same subject matter). Moreover, defendant permitted the court to reinstruct the jury in the precise language of ORS 366.365 without making any objection, despite the court's express request for exceptions. Defendant does not assign error to the court's *reinstruction* of the jury in the statutory language. Accordingly, even if defendant's assignment of error to the initial instruction of the jury had been preserved, it would not provide a basis for reversal.

In his third assignment of error, defendant asserts that the trial court erred in denying his motion for a directed verdict on his third counterclaim for inverse condemnation based on plaintiff's alleged overuse of the 1991 easement. Defendant argues that plaintiff exceeded the permitted use by giving its general contractor permission to use heavier equipment, for a more extensive project, than was contemplated by the easement. Viewing the record in the light most favorable to plaintiff, we conclude that there was evidence from which the jury could find that *defendant* gave the general contractor permission to use the equipment on an alternate

route across his property for access to the work area and that, accordingly, the 1991 easement was not overburdened. The trial court properly denied defendant's motion for a directed verdict.

In his fourth assignment of error, defendant asserts that the trial court erred in granting plaintiff's motion for a directed verdict on his fourth counterclaim. In that counterclaim, also for inverse condemnation, defendant sought compensation for the taking of the right to lateral support of his property adjoining the condemned property. Defendant argues that, because plaintiff prevailed in its claim for condemnation of the 2.7 acre parcel, it maintains the right to perform the project as originally planned. According to defendant, there was sufficient evidence to show that excavation required to complete the original project would result in the removal of lateral support for his remaining property and would thus cause erosion. Defendant contends that this proceeding furnishes his only opportunity to litigate the loss of lateral support. In the alternative, he asserts that the counterclaim should not have been dismissed with prejudice, because such a dismissal bars any future claim for compensation should the original project eventually be undertaken, causing a loss of lateral support. We review the trial court's decision to dismiss the counterclaim with prejudice for abuse of discretion. *Bernard v. Gary J. Lekas*, P.C., 124 Or. App. 416, 418, 862 P.2d 564 (1993). For the following reasons, we conclude that there was insufficient evidence to establish defendant's counterclaim, but we hold that the court erred in dismissing it with prejudice.

We begin with a brief review of the legal principles governing claims for loss of lateral support. In *Mosier v. Oregon Navigation Co.*, 39 Or. 256, 64 P. 453 (1901), the Supreme Court explained the right of "lateral support":

> "It is familiar law that an owner of land is entitled to have it remain in the state in which it was placed by nature, supported and protected by adjoining soil. This right of lateral support, as it is called, is a right of property annexed

> to the land, to which the owner is as much entitled as to the land itself. If an adjoining proprietor, in excavating on his own land, removes such support, to the injury of his neighbor's soil, he is liable in an action therefor, without proof of negligence." *Id.* at 258.

The right to lateral support is an interest in land, the loss of which entitles the owner to compensation:

> "'If, in the execution of public works under authority of law, excavations are made, and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The right of lateral support is a part of his property in the land, as much so as his right of user or of exclusion. When he is deprived of it, his property is taken just as much as if his property was invaded.'" *Id.* (quoting 1 Lewis, *Eminent Domain* (2d ed) § 151). *See also Kropitzer v. City of Portland*, 237 Or. 157, 159, 164, 390 P.2d 356 (1964).

Defendant's fourth counterclaim assumes that the interest acquired by the state by condemnation includes the right to remove lateral support from the adjacent property. However, that is not the case. As *Mosier* makes clear, a condemnation or purchase of property for a public purpose does not necessarily include the right to remove lateral support to adjacent property:

> "[T]he destruction of the lateral support, and consequent sliding of the adjacent soil, is as much a taking of the soil as if the company had actually occupied it and it is therefore not within the 'constitutional limits' of the legislature to license a railroad company or any one else to remove such support without an equivalent, as required by the constitution. *Nor are the damages for such an injury included either in a grant from the owner of a right of way or in a judgment of condemnation. The assessment of damages for the right of*

*way, or a grant for such purpose, includes the value of the land itself, as well as all incidental injury, inconvenience, or damage, incurred or liable to be incurred by the proper construction and use of the road, or by any acts necessary to such proper construction and use * * *, but not for a physical invasion of the soil outside of the right of way." 39 Or. at 261-62.* (Emphasis added.)

The Supreme Court's opinion in *Kropitzer* is not to the contrary. There, the court determined that a landowner's *dedication* of land to a municipality for the construction of a street implicitly included an easement for the removal of support to adjacent land. The court based that determination on the presumed intention of the parties. Here, in contrast, the trial court *ordered* the conveyance of defendant's property to the state. Unlike the circumstances in *Kropitzer*, it cannot be said that defendant intended for plaintiff's taking of the 2.7 acre parcel to include the removal of lateral support. Accordingly, the right to lateral support for his retained property remains with defendant. Should plaintiff's activities on the condemned property cause a loss of lateral support in the future, an additional compensable taking may occur. *See Cereghino et al v. State Highway Com.*, 230 Or. 439, 446, 370 P.2d 694 (1962).

We turn to the question of whether the trial court properly dismissed defendant's counterclaim with prejudice. A dismissal "with prejudice" normally creates a claim preclusion bar. *Sandgathe v. Jagger*, 165 Or. App. 375, 380, 996 P.2d 1001 (2000). In *Sandgathe*, we held that, in view of the preclusive effect of such a dismissal, the termination of an action as premature should be without prejudice. *Id.* at 384. There, we reversed a judgment that dismissed, with prejudice, a legal malpractice claim based upon the defendant's allegedly inadequate representation of the plaintiff in a criminal case in which the plaintiff was convicted. The claim was dismissed because the plaintiff could not prove legally cognizable injury from the alleged malpractice in light of the fact that his conviction had never been overturned. We

concluded that such a dismissal would improperly preclude the plaintiff from pursuing his claim against the defendant if his conviction were ultimately overturned. *Id.* at 379. Here, defendant's counterclaim was dismissed because he could not prove that any loss of lateral support had yet occurred. In the same sense as was the plaintiff's claim in *Sandgathe*, defendant's claim was premature; he did not establish any legally cognizable injury. Therefore, the trial court erred in entering a judgment dismissing the fourth counterclaim with prejudice.

Defendant next assigns error to the trial court's denial of his post-trial motion to compel discovery of documents. Defendant sought production of all documents relating to the state's initial appraisal of the condemned property. Defendant argued that the documents were material to his claim for attorney fees insofar as they might bear on whether plaintiff's first offer of compensation was made in "bad faith." Defendant's attorney fee claim was based on ORS 35.346(7)(b),[5] which provides:

> "If a trial is held or arbitration conducted for the fixing of the amount of compensation to be awarded to the defendant owner or party having an interest in the property being condemned, the court or arbitrator shall award said defendant costs and disbursements including reasonable attorney fees and reasonable expenses as defined in ORS 35.335(2) in the following cases, and no other:
>
> "* * * * *
>
> "(b) If the court finds that the first written offer made by condemner to defendant in settlement prior to filing of the action did not constitute a good faith offer of an amount reasonably believed by condemner to be just compensation."

---

[5] Defendant was not entitled to attorney fees under ORS 35.346(7)(a), which allows fees to the defendant in a condemnation action "[i]f the amount of just compensation assessed by the verdict in the trial exceeds the highest written offer in settlement." Defendant does not assert that the state's highest written offer was lower than the jury's verdict.

Here, plaintiff's initial offer of compensation was $20,500. At trial, plaintiff did not offer into evidence or otherwise rely on its original appraisal report. Instead, it presented evidence that the value of the condemned property was $8,050. The jury ultimately awarded defendant compensation of $28,888.

In response to defendant's discovery motion, plaintiff asserted that the materials were prepared in anticipation of litigation and therefore were privileged from disclosure. The trial court agreed with plaintiff and denied the motion. The court found that plaintiff's initial offer had been made in good faith and awarded the state its costs and disbursements incurred pursuant to ORS 35.346(8) ("Costs and disbursements other than reasonable attorney fees and expenses as defined in ORS 35.335(2) shall be awarded to condemner in all cases other than those in which defendant is entitled to costs and disbursements under subsection (7) of this section.").

We review the trial court's ruling on the discovery motion for abuse of discretion. *Doe v. Denny's, Inc.*, 146 Or. App. 59, 67, 931 P.2d 816 (1997). In *Brink et ux v. Multnomah County*, 224 Or. 507, 517-18, 356 P.2d 536 (1960), the Supreme Court held that an appraisal report prepared in connection with actual or threatened condemnation litigation was privileged. In this case, the initial appraisal was prepared after plaintiff had adopted a resolution to acquire the condemned property and was made in anticipation of settlement or litigation of the claim. There is no meaningful distinction between the circumstances in *Brink* and those present in this case. Our decision in *City of Portland v. Nudelman*, 45 Or. App. 425, 608 P.2d 1190, *rev den* 289 Or. 275 (1980), is not to the contrary. In *Nudelman*, we held that an appraisal report that was not prepared in anticipation of condemnation litigation was not privileged. Our conclusion was grounded on the facts that "[t]he report at issue *** was prepared before the plaintiff had decided to acquire the property in question and long before any steps toward preparing litigation were made." *Id.* at 433. Here, the appraisal was

performed under materially different circumstances. The trial court did not abuse its discretion in denying discovery of documents relating to the initial appraisal.

We turn to defendant's sixth assignment of error. At trial, defendant sought to introduce two documents relating to plaintiff's initial offer of compensation as evidence of the market value of the taken property. Exhibit 139 was plaintiff's first written offer to purchase the subject property for $ 20,500. Exhibit 140 was an "acquisition summary," which included plaintiff's determination of the fair market value of the property. Plaintiff moved *in limine* to exclude the documents on the ground that they constituted an offer to
compromise that was inadmissible under OEC 408. The trial court denied plaintiff's motion. Defendant then offered the documents at trial as evidence of admissions by plaintiff that were relevant to the issue of just compensation. Plaintiff again objected, and this time the trial court sustained the objection.

On appeal, defendant assigns error to the exclusion of the exhibits. Defendant argues that the trial court's exclusion of the documents improperly prevented the jury from drawing an appropriate inference from plaintiff's reduction of the alleged value of the property. We conclude that the court properly excluded the exhibits.

In *Highway Com. v. Assembly of God et al*, 230 Or. 167, 368 P.2d 937 (1962), the Supreme Court held that the price proposed in a written offer to purchase condemned property may reflect consideration of anticipated costs of litigation if an agreement is not reached. Thus, the court held that such an offer does not preclude the condemner from later alleging a lower value in its pleadings. In *State Highway Comm. v. Freeman*, 11 Or. App. 513, 504 P.2d 133 (1972), this court upheld the trial court's refusal in a condemnation case to admit evidence of the plaintiff's pretrial written offer of settlement. We held that the offer did not constitute an admission as to the value of the property.

Defendant notes that federal case law interpreting the Uniform Relocation Assistance Act, 42 USC § 4602, adopted in Oregon as ORS 281.045 to ORS 281.105, has required admission of pretrial offers to settle as admissions of value. *See United States v. 416.18 Acres of Land*, 525 F.2d 450 (7th Cir 1975). That case law involves relocation payments to persons displaced by condemnation and is not controlling here. Both *Assembly of God* and *Freeman* support the trial court's ruling that the documents are not admissible as pre-litigation offers of settlement. The trial court did not err in following those decisions.

In summary, we conclude that the trial court properly denied defendant's motion for a directed verdict on his first counterclaim for inverse condemnation. Defendant's failure to preserve his objections to the trial court's failure to give his requested jury instructions on the first counterclaim prevents our consideration of those objections. There was evidence to support the jury's verdict for plaintiff on defendant's third counterclaim for inverse condemnation. The trial court did not err in granting plaintiff's motion for a directed verdict on defendant's fourth inverse condemnation counterclaim, because there was no evidence that defendant's remaining property has suffered a loss of lateral support. However, the court erred in entering a judgment dismissing that counterclaim with prejudice. The trial court did not err in denying defendant's post-trial motion to compel discovery of plaintiff's initial appraisal of the condemned property. Finally, the trial did not err in excluding from evidence documents relating to plaintiff's initial offer of compensation.

Judgment dismissing defendant's fourth counterclaim with prejudice reversed and remanded for entry of judgment of dismissal without prejudice; otherwise affirmed.

**APPENDIX C**

CIRCUIT COURT OF OREGON
MULTNOMAH COUNTY

| | | |
|---|---|---|
| STATE OF OREGON, by and through its Department of Transportation, | ) | No. 96-0403061 |
| | ) | JUDGMENT |
| Plaintiff, | ) | |
| v. | ) | |
| HOWARD A. WINTERS, | ) | |
| Defendant. | ) | |

The above-entitled matter came on regularly for trial on the 29th and 30th days of September, 1997, and 1st, 2nd and 3rd days of October, 1997, on plaintiff's condemnation case and on defendant's various counterclaims for inverse condemnation and trespass, before Judge Roosevelt Robinson of the above-entitled court, plaintiff appearing by and through Albert C. Depenbrock of its attorneys; and the defendant appearing by and through Donald Joe Willis, his attorney;

The issue of the necessity of plaintiff's acquisition having been tried on February 24, 1997, before the Honorable Louis J. Fasano, *pro tem*, without a jury, and said court finding that the real property described herein is necessary for public use;

It appearing to the court and the court finding that the plaintiff, prior to the commencement of this condemnation action and pursuant to its resolution, attempted to acquire said real property by agreement and purchase, but was unable to do so;

After hearing all of the evidence and argument of counsel, the court directed a verdict in plaintiff's favor on defendant's fourth counterclaim for inverse condemnation of the slope easement on the grounds that as a matter of law loss of lateral support does not occur until there is actual removal of earth and subsiding of the slope, and the court finds there has not been removal of any earth or a subsiding of the slope to date.

A jury having been called, examined, and duly empaneled and sworn; the parties having made their opening statements; the parties having adduced evidence in support of their contentions; arguments by respective parties having been made to the jury, the jury having been instructed in the law and having retired for deliberations did, on the 3rd day of October, 1997, return its verdict, which verdict, omitting the title of the court and cause, as follows:

> We, the jury, being duly empaneled and sworn, find our verdict, pursuant to the court's instructions as follows: Defendant Howard Winters is entitled to just compensation for the taking of his property described in plaintiff's State of Oregon's Complaint, in the amount of $28,888.
>
> On defendant's first Counterclaim, do you find that plaintiff inversely condemned a temporary work easement from defendant Winters? [Answer] No.
>
> On defendant's second, Alternative Counterclaim for trespass ... we find that defendant Winters has been damaged by this trespass in the amount of $2,000.
>
> On defendant's third Counterclaim, do you find that plaintiff inversely condemned additional rights for more intensive use of its previously-acquired access easement from defendant Winters? [Answer] No.
>
> "DATED this 3rd day of October, 1997.
>
> /s/_____
> Foreperson."

The court finds that the amount of the verdict of the jury for just compensation was less than plaintiff's highest written offer in settlement submitted to defendant at least 30 days prior to the commencement of trial. The court listened to defendant's objections to plaintiff's proposed judgment and defendant's argument that defendant is entitled to his attorney fees under ORS 35.346(2)(b). The court denied defendant's motion to compel documents post-trial which defendant requested for the purpose of supporting his right to attorney fees, costs and disbursements under ORS 35.346(2)(b). The court having found that the plaintiff's initial offer was made in good faith, plaintiff is entitled to its costs and disbursements incurred herein under ORS 35.346(3).

It appearing to the court from files and records herein and the Court finding that on April 22, 1996, the plaintiff heretofore deposited the sum of $20,500 with the clerk of the court for the use and benefit of the defendant herein; and

It further appearing to the court that plaintiff now has deposited the balance of the verdict over and above the said $20,500 heretofore deposited, the added sum of $8,388, plus interest at 9% per annum from April 27, 1996, the date the plaintiff took possession of the property described herein, to the date of payment, and the further sum of $2,000 and that judgment should enter as follows:

IT IS HEREBY ORDERED AND ADJUDGED:

1.

That the real property hereinafter described be, and the same hereby is appropriated for public purposes; and title to said property, together with all rights and easements therein be, and the same herein is vested in the State of Oregon, by and through its Department of Transportation, free and clear of all liens and encumbrances except as set forth herein. Said real property so appropriated is described on the attached Exhibit 1.

The use to be made of each parcel is as follows:

Title in fee simple to the property described in the Exhibit 1 attached hereto.

2.

Plaintiff shall take title of the real property described herein subject to the interest of others than the within named defendant in the following encumbrance:

Easement in favor of State of Oregon for slopes and access road dated October 10, 1991, recorded November 14, 1991, Book 2477, Page 982.

3.

Defendant's first and third counterclaim in inverse condemnation are dismissed with prejudice pursuant to the jury verdict in this matter, and defendant's fourth counterclaim is dismissed with prejudice pursuant to the court's directed verdict on the grounds that loss of lateral support does not occur until there has been removal of earth and actual subsiding of the soil and the court has found that as of trial no such removal of earth or subsiding of the soil had taken place.

4.

On defendant's counterclaim for trespass defendant is awarded the sum of $2,000.

5.

Plaintiff is awarded the sum of $_____, for plaintiff's costs and disbursements incurred herein.

MONEY JUDGMENT PURSUANT TO ORCP 70A

| | |
|---|---|
| Judgment Creditor: | State of Oregon, by and through its Department of Transportation |
| Judgment Creditor's Attorney: | Albert C. Depenbrock |
| Judgment Debtor: | Howard A. Winters |
| Judgment amount: | $851.47 |
| Prejudgment Interest: | None |
| Postjudgment Interest | Nine percent (9%) per annum |
| Accrual Rate: | simple interest. |

Dated this 1st day of Dec., 1997.

/s/ R. Robinson
ROOSEVELT ROBINSON
CIRCUIT COURT JUDGE

Submitted by: Albert Depenbrock
Assistant Attorney General
of Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that on November 26, 1997, I served a true and correct coy of the foregoing proposed *Judgment* by the method indicated below, and addressed to the following:

Joseph A. Tripi
Attorney at Law
Schwabe Williamson & Wyatt
Suites 1600-1800, Pacwest Center
1211 SW Fifth Avenue
Portland, Oregon 97204-3795

_____ HAND DELIVER
__X__ U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)

/s/ Albert Depenbrock
ALBERT DEPENBROCK #78035
Assistant Attorney General
Trial Attorney
Of Attorneys for Plaintiff
1162 Court Street NE, Room 100
Salem, OR 97310-0506
Telephone: (503) 378-6313

# APPENDIX D

Oral Opinion of the Circuit Court of
Multnomah County, Oregon (October 3, 1997)

"MR. WILLIS: And I've already moved for directed verdict that there was a taking on the access easement. I separately move for directed verdict that as a matter of law there has been a taking under the appropriation and use by the surveyors for the work area.

"THE COURT: All right, denied."

(Tr. Vol. 7, pp. 1037, l. 25 – 1038, l. 6).

# APPENDIX E

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### *Constitutional Provisions*

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I of the Oregon Constitution provides in relevant part:

> SECTION 18. Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any man be demanded, without

just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.